No. 12,228

IN THE

United States Court of Appeals

For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Reply Brief for Petitioner

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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This case, as previously stated (Pet. Opng. Br. 2-5), is a federal estate tax case involving the questions of the proper mortality table and the proper quarterly factor to be used in valuing a life estate. Petitioner wishes to point out that this is the first case in which either of these questions has been presented to any United States Court of Appeals.

THE COMMISSIONER'S REGULATIONS WITH REGARD TO THI ACTUARIES' OR COMBINED EXPERIENCE TABLE OF MOR TALITY AND THE QUARTERLY FACTOR DO NOT HAVE THI FORCE AND EFFECT OF LAW. THE QUESTION IS ONE O EVIDENCE AND IN VIEW OF THE UNCONTRADICTED EVI DENCE, THE TAX COURT ERRED IN FAILING TO VALUE THI LIFE ESTATE OF ESTELLE W. KOSHLAND ON THE BASIS O THE 1937 STANDARD ANNUITY MORTALITY TABLE AND I FAILING TO FIND THAT THE FACTOR FOR QUARTERL PAYMENTS WAS .375 TO BE ADDED TO THE FACTOR FO ANNUAL PAYMENTS.

1. The Commissioner's Regulations with Regard to the Actuarie or Combined Experience Table of Mortality and the Quarterl Factor Do Not Have the Force and Effect of Law.

The respondent's whole case is based on the contentio that "Having stood for so long in the regulations thi mortality table [the Actuaries' or Combined Experienc Mortality Table] would seem to have attained a dignit and force akin to that of law." (Resp. Br. 12).

The respondent's contention is not sound. The Ta Court itself in the instant case treated the question as t what mortality table should be used as a question of proo to be decided upon the evidence. Petitioner submits tha the Tax Court erred in ignoring the uncontradicted ev dence and in failing to find therefrom that the 193 Standard Annuity Mortality Table should have been use The Tax Court in its opinion in no way intimated, hov ever, that the use of the Actuaries' or Combined Exper ence Mortality Table was required as a matter of la or that its presence in the regulations gave it "a dignit and force akin to that of law."

In none of the other Tax Court decisions on the poir which the respondent cites on page 8 of his brief, did t

Court indicate that it considered the question as one of law. It expressly treated the question as one to be decided upon the evidence in each of these cases.

As pointed out on page 8 of petitioner's opening brief, the Tax Court in the cases of *Estate of John Halliday Denbigh* (1946) 7 T.C. 387 and *Nellie H. Jennings Est.* (1948) 10 T.C. 323 has refused to apply standard mortality tables where the evidence indicated that the person whose life expectancy was in question would not live for as long a period as the life expectancy assumed for his age in such tables. In the *Denbigh* case, the Court said "* * * such tables are evidentiary only and they need not be controlling." If as the respondent contends, the Commissioner's mortality table had to be used as a matter of law because it had been retained in the regulations for many years, then it would have been immaterial in the *Jennings* and *Denbigh* cases whether or not on the evidence the respective decedents could not live out their life expectancies. Valuation of their life estates in each of these cases would, as a matter of law, have had to be made upon the basis of the expectancies stated in the Commissioner's table.

The Court of Claims in the case of *Hanley, Administrator v. United States* (1945), 63 Fed. Supp. 73, which is discussed on pages 7 and 8 of petitioner's opening brief likewise indicated that the question was one of evidence and that if the regulations were held to require the use of the Commissioner's table as a matter of law in all cases, they would not be valid.

The *Hanley* case is a square decision that the question as to the applicability of Table A (and of the Actuaries'

or Combined Experience Mortality Table on which it based) is one of evidence and that, if the regulations we construed to require their use as a matter of law, th would be invalid.

The respondent in his brief attempts to distinguish t *Hanley* case upon the ground that in that case the intere factor was involved, whereas in the instant case the mo tality factor and not the interest factor is at issue. T distinction is obviously untenable. The interest fact forms as integral a part of Table A as the mortali factor, and if, as respondent contends, the incorporati of the table in the regulations gives it the force a effect of law, it must do so with regard to the intere factor as well as with regard to the mortality factor.

The respondent's brief does not expressly state that h force of law contention applies to his quarterly fact as well as to his mortality table. Since, however, t respondent's regulation with regard to the quarterly fact has been in the regulations for many years also, his arg ment is equally applicable thereto. The respondent thus forced into the position of contending that the math matical error which the Commissioner made in holdi that his quarterly factor is applicable where a life esta is involved has the force of law (see Pet. Opng. Br. 35-3

The cases which respondent cites on page 12 of his bri do not support him. They are all cases where regulatio were involved which dealt essentially with questions law and not with questions of fact. Neither these cases n any other cases hold that a regulation which states a p sumption as to facts, as for example on a question valuation, is to be followed where on the evidence it

shown to be erroneous as applied to the specific case at hand. If the issue in the instant case were whether mortality tables could be used in the valuation of a life estate, then a regulation indicating that they should be used could be held to have the force and effect of law. The issue in the case of *Simpson v. United States* (1920) 252 U.S. 547 was whether mortality tables could be used in the valuation of life estates. In the words of the Court in that case, "The objection [of the taxpayer] is not to the particular table that was used but to the use of any such table at all—to the method."*

There is no such objection, however, in the instant case. The petitioner does not challenge the use of mortality tables. The petitioner contends that on the uncontradicted evidence in this case, the proper mortality table to use is not the obsolete and outmoded Actuaries' or Combined Experience Table of Mortality, but the 1937 Standard Annuity Mortality Table. The objection here is not to the method, but to the table used. Such a question is one of evidence. The inclusion in the regulations of Table A based on the Actuaries' or Combined Experience Table of Mortality may raise a presumption of its correctness like the general presumption of correctness of the Commissioner's determinations, but it does no more. It does not

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*The table in that case, like the table in the instant case, was based on the Actuaries' or Combined Experience Table of Mortality, but it must be remembered that that case involved a succession tax assessed under the Spanish War Revenue Act of June 13, 1898 (30 Stat. 448) and a decedent who died in June, 1899, some 45 years before the instant decedent. The uncontradicted evidence in the instant case is that the Actuaries' or Combined Experience Table of Mortality became obsolete prior to 1900 (R. 13, Pet. Opng. Brief 10).

make the use of Table A mandatory as a matter of law i cases where on the uncontradicted evidence its use i plainly erroneous.

This conclusion is buttressed by uniform decisions o the Courts in an analogous situation. For a while th Commissioner's regulations with regard to the valuatio of securities contained the following provision: "The siz of the gift of any security is not a relevant factor an will not be considered in such determination." (Gift Ta Regulations 79, Article 19 (1936 ed.)). The estate ta regulations, Regulations 80, Article 13, contained a simila provision.* The Courts uniformly refused to give these pr visions any binding effect. Thus the Board of Tax Appea in *Safe Deposit & Trust Co. of Baltimore, Executor* (1937 35 B.T.A. 259 at 263, said:

> "* * * 'Blockage' is not a law of economics, a prin ciple of law, or a rule of evidence. If the value of given number of shares is influenced by the size of th block, this is a matter of evidence and not of doc trinaire assumption * * * Whatever force the Com missioner's regulations (article 13) may have durin the consideration of the matter in the stages befo litigation in the Board or the courts, it can not la down a controlling rule of evidence in such litigatio *Second National Bank of Philadelphia,* 33 B.T.A. 75 755."

This decision was affirmed in (C.A. 4, 1938) 95 Fed.(2 806. To the same effect are *Commissioner v. Shattuck* (C. 7, 1938) 97 Fed.(2d) 790, *Helvering v. Kimberly* (C.A. 1938) 97 Fed.(2d) 433, and *John J. Newberry* (1939)

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*These provisions in both the estate and gift tax regulatio were deleted by the Commissioner in 1939.

B.T.A. 1123. See also *Groff, Exr. v. Munford, Admr. (Smith Est.)* (C.A. 2, 1945), 150 Fed.(2d) 825; *Helvering v. Maytag, Exr.* (C.A. 8, 1942), 125 Fed.(2d) 55, cert. den. 316 U.S. 689, and *Estate of Leonard B. McKitterick* (1940), 42 B.T.A. 130, petition for review dismissed (C.A. 2, June 27, 1942).

The respondent on page 11 of his brief cites *Ithaca Trust Co. v. United States* (1929), 279 U.S. 151 and certain other cases. None of these cases involve any question as to what mortality table should be used and they are not in point. In fact, the Board of Tax Appeals in one of these cases, *Fidelity-Philadelphia Trust Co.* (1933), 27 B.T.A. 972 at 980, said "It is not a question of law as to what the life expectancy of a person is, whether that person be an individual alone or the survivor of a group of individuals."

. The Tax Court Erred in View of the Uncontradicted Evidence in Failing to Value the Life Estate of Estelle W. Koshland Upon the Basis of the 1937 Standard Annuity Mortality Table and in Failing to Find That the Factor for Quarterly Payments Was .375 to Be Added to the Factor for Annual Payments.

Apart from the comments above made on respondent's argument with regard to the regulation having the force and effect of law, little need be said in reply to his brief. Petitioner's brief carefully analyzed the evidence and demonstrated that upon the basis of the uncontradicted evidence with no evidence at all having been offered by the respondent, the Actuaries' or Combined Experience Table of Mortality is obsolete and the Commissioner's quarterly factor is erroneous and that the Tax Court erred in their use, and that the Tax Court further erred in failing to use

the 1937 Standard Annuity Mortality Table and the petitioner's quarterly factor.

The respondent's rather skimpy brief completely ignores petitioner's careful analysis of the evidence and, except for his argument as to the binding effect of the regulations, is in reality a rehash of the Tax Court's opinion.

The respondent's statement of facts commencing with the third paragraph on page 4 of his brief and going through the first paragraph on page 6 is taken verbatim but without quotation marks from the Tax Court's findings of fact on pages 45-47 of the record. In so doing, the respondent has repeated the errors which the Tax Court made in its findings. Petitioner has carefully analyzed the uncontradicted evidence in the record and has pointed out these errors on pages 8-24 and 29-40 of its opening brief.

These pages of petitioner's opening brief dispose also of respondent's arguments, other than his "force of law" argument which petitioner has answered above. The Tax Court's argument that petitioner's table "might be worthy of further consideration if our question were the cost of an annuity from a commercial insurance company," which respondent repeats on pages 9 and 10 of his brief, is considered in detail on pages 16-19 of petitioner's opening brief. As therein pointed out, the Tax Court's reasoning which the respondent adopts is not only in conflict with the uncontradicted evidence but is in conflict with the Tax Court's own findings of fact and with the Treasury Regulations.

The respondent states on pages 12 and 13 of his brief that it was brought out on cross-examination that the 19[illegible] table is not in general use, being used by insurance com[illegible]

panies only for the computation of annuities and that it was further brought out on cross-examination that the table which is considered as reflecting general mortality experience is the Insurance Commissioner's 1941 Standard Ordinary Table. Both these statements, as pointed out on pages 8-24 of petitioner's opening brief, are in direct conflict with the record and the first statement is in addition in direct conflict with the Tax Court's own findings of fact. The Tax Court found, as indicated in petitioner's opening brief at page 19, that "The 1937 Standard Annuity Table has been used * * * by actuaries as a basis for determining * * * life estates since 1937." (R. 46). The uncontradicted evidence in the record is that the 1937 Table is the most current standard table that would reflect the life expectancy of a person at the date of Mr. Koshland's death in 1944 and at the date of the trial in 1948 (R. 101-102; Pet. Opng. Brief 14).

The Tax Court found that the Insurance Commissioner's 1941 Standard Ordinary Table of Mortality is "considered as reflecting general mortality experience" but, as pointed out in petitioner's opening brief, particularly commencing at page 20, this finding is in direct conflict with the uncontradicted evidence, which is to the effect that the 1941 table is loaded and does not reflect general mortality experience, and that the table which does reflect general mortality experience and which actuaries and life insurance companies use to value life estates and annuities is the 1937 table.

Respondent, on page 13 of his brief, states that the 1937 table is confined to the experience of a select group. This is in conflict with the uncontradicted evidence that

the 1937 table is the table which would be used by al actuaries in valuing a life estate as of the date of Mr Koshland's death (see Pet. Opng. Br. 13-15), and tha experience has shown that actual longevity is in excess o the longevity shown by this table so that insurance com panies, in using the table, have to assume a lesser age tha the actual age of the person. In other words, the uncon tradicted testimony is that the insurance companies i using the table add loading to it. The loading, howeve is not in the table but is added to it, whereas in the 194 table, the loading is right in the table (see quotations fro the record, Pet. Opng. Br. 13-23).

Respondent's contention that the 1937 table is confine to the experience of a select group is in conflict also wit specific evidence in the record to the effect that the 193 table is used by insurance companies not only in case where a person is buying an annuity from a company bu also in cases where an insured dies and provides that th proceeds of his policy shall be paid to the beneficiary no in one lump sum but in periodic installments for life, an that even in such cases actual experience has shown tha the life expectancy is in excess of that stated in the 193 table.* The beneficiaries of life insurance proceeds to h

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*Mr. Waites testified:

"Q. (By counsel for respondent) Now, Mr. Waites, isn't it fact that in compiling a table such as the 1937 Standard Annuit Table the table is likewise weighted the other way in favor of th insurance company, and the life expectancy is given an outsid limit so that the company would not be called upon to be payin annuities far beyond what the ordinary person might be expecte —the life expectancy of the ordinary person. Do you understar my question?

A. Yes, I think I understand your question.

aid in installments upon the death of the insured are not select group in any sense. They are not selected either y themselves or by the insurance companies but they are imply the recipients in installments of insurance left by ısured decedents.

Q. In other words, an annuity table, in order to prescribe a roper reserve for annuity purposes, you must be conservative ıd assume that the annuitants will outlive their life expectancy ıst as you testified that there is a tendency to be conservative ı life insurance and assume that the man will die sooner. Isn't ıat a correct statement?

A. I think your question can be best answered in this manner: he nearest approach to the situation that we have on hand this orning is this: Where a man takes out insurance and provides ıat insurance will be payable to his wife, say, for example, in onthly installments, or periodic installments for life. Now then, ı a case such as that the wife has no say in the selection of the ınuity. Nevertheless, the experience under such annuities indi-ıtes that the 1937 Standard Annuity Table isn't conservative ıough, they should be using it at least rated down one year, and ractically all of the major insurance companies now under such ınuities are rating that 1937 Standard Annuity down two years, cause of the fact that their annuitants are living longer.

The Court: Rating it down? I should think——

The Witness: By 'rating it down' I mean if the individual's e is 64, they take the value shown as at age 62. It's really tting it down rather than rating it down.

The Court: I think Mr. Hurley's question was with regard to e actuarial data used by the insurance companies themselves. n't it true that in life insurance policies those tables always are nservative in estimating an earlier death than perhaps the actual perience would warrant, and in case of annuities don't those bles actually used by the insurance companies in figuring their emiums assume a later death than their experience actually rrants?

The Witness: Only if you are buying an annuity from the in-rance company. Under the options that I have indicated here, u are not buying an annuity, it is just one method whereby the yments are distributed." (R. 122-123)

The respondent, on pages 10 and 13 of his brief, make a point that mortality tables referred to in the evidenc other than the Actuaries' or Combined Experience Mor tality Table show a life expectancy less than that set fort in the 1937 Standard Annuity Mortality Table. As i pointed out in petitioner's opening brief, pages 10-12 an particularly at page 12, a number of mortality tables wer introduced into evidence which were standard mortalit tables as of the time that they were developed and whic were in current use from time to time. They illustrate th fact that the expectancy of life has been constantly in creasing. The uncontradicted testimony is that the olde tables became obsolete as newer tables, based on mo recent experience, were introduced (R. 80, 82, 84). Th uncontradicted testimony further is that the table whic "is the most current standard table that would reflect th expectancy" of a person at the time of Mr. Koshland death and which is used by every actuary in valuing li estates as of that date is the 1937 Standard Annuity Mo tality Table. The uncontradicted testimony as pointed o on page 15 of petitioner's opening brief is not, as the Ta Court found, that the 1937 Standard Annuity Mortali Table is "one of the most current tables" but is "*the* mo current standard table."

Respondent's only argument with regard to the qua terly factor consists of a quotation of the single par graph of the Tax Court's opinion on that issue, and then further paragraph which in effect paraphrases what t Tax Court said in its opinion (Resp. Br. 14-15). Respon ent apparently, being unable in any way to answer t petitioner's conclusive demonstration of the Tax Cour

error on the quarterly factor (Pet. Opng. Br. 29-40), has decided to ignore it. What has been said in petitioner's opening brief on the quarterly factor need not be repeated here.

Respondent attempts also to dismiss in rather cursory fashion petitioner's point that even assuming that the Tax Court did not err in failing to value the life estate upon the basis of the 1937 table and upon the basis of the petitioner's quarterly factor, it erred in view of the uncontradicted evidence in valuing said life estate upon the basis of the Actuaries' or Combined Experience Mortality Table and upon the basis of the respondent's quarterly factor, and in failing to find that the respondent's use of said table and said quarterly factor was arbitrary and invalid and in failing to place the burden of proof upon respondent with regard to the correct table and the correct quarterly factor.

As pointed out on pages 46-47 of petitioner's opening brief, if the petitioner had confined itself merely to introducing the uncontradicted evidence which is in the record on the Actuaries' or Combined Experience Table and the respondent's quarterly factor, then *Helvering v. Taylor* (1935), 293 U.S. 507 would require that the Tax Court's decision be reversed and the case remanded for further hearing. Out of an excess of caution, petitioner has argued in the alternative the applicability of *Helvering v. Taylor*. Petitioner, however, has gone beyond merely exposing respondent's error and has introduced uncontradicted evidence establishing the applicability of the 1937 table and of petitioner's quarterly factor.

As pointed out in petitioner's opening brief, even consideration of the need for revenue cannot justify sustain-

ing the respondent in the instant case because the use o his mortality table and quarterly factor probably costs th Government more revenue than it gains. It may well b that an adverse decision in the instant case will force th respondent to abandon his reliance upon an outmoded mor tality table and upon an erroneous quarterly factor. B that as it may, on the basis of this record it is clear tha the Tax Court erred in failing to value Mrs. Koshland' life estate upon the basis of the 1937 Standard Annuit Mortality Table and petitioner's quarterly factor, and i is respectfully submitted that this Court should not merel remand but should reverse the Tax Court with instruc tions to enter a decision in petitioner's favor upon th valuation issue.

Respectfully submitted,

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Dated: September 9, 1949.